Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Relay Services	)	
And Speech-to-Speech Services for	)	CC Docket No. 98-67
Individuals with Hearing and Speech	)	
Disabilities	)	

COMMENTS OF HAMILTON RELAY, INC.

Hamilton Relay, Inc. ("Hamilton"), by its attorneys and pursuant to Section 1.106(g) of the Commission's rules, 47 C.F.R. § 1.106(g), hereby comments on the Petition for Limited Reconsideration ("Petition" or "Sprint Petition") filed on April 14, 2003 by Sprint Corporation ("Sprint") in the above-captioned proceeding.[1] Hamilton addresses the issues raised in the Petition, and seeks clarification of certain aspects of the Commission's *Order on Reconsideration* in this proceeding.[2]

Introduction

On April 22, 2002, the Commission released its *Declaratory Ruling and Second Further Notice of Proposed Rulemaking* ("*IP Relay Order*"), which set forth the minimum standards for Internet Protocol ("IP") Relay providers of Telecommunications Relay Services ("TRS").[3] In the *IP Relay Order*, the

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[1] Sprint refiled its submission on April 24, 2003.
[2] FCC 03-46 (rel. Mar. 14, 2003).
[3] In the Matter of Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, (continued…)

Commission waived certain standards for IP Relay providers for a one-year period, but required that hearing carryover ("HCO") and 900 (or pay-per-call) services be provided by IP Relay providers.[4] The Commission held that any provider of IP Relay services that was unable to provide HCO or 900 services would be ineligible to recover costs from the Interstate TRS Fund, unless the IP provider sought and obtained a waiver of those standards.[5]

As a result of the Commission's decision, Hamilton did not commence its IP Relay services, because Hamilton was unable to certify to the Fund Administrator that it was providing HCO and 900 services, and thus was unable to recover its costs from the Interstate TRS Fund. Hamilton, like all other IP Relay providers, is unable to provide HCO and 900 services because it is technically infeasible to do so at this time. Accordingly, Hamilton joined others in urging the Commission to waive the HCO and 900 requirements.

While Commission reconsideration of the *IP Relay Order* was pending, other providers, in contrast to Hamilton, commenced IP Relay services despite their inability to provide HCO and 900 services. Some even received compensation from the Interstate TRS Fund upon certifying that they were an "eligible provider" without disclosing that they were not providing HCO and 900 services.[6] Sprint did

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Declaratory Ruling and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-67, FCC 02-121, 17 FCC Rcd 7779 (2002) ("*IP Relay Order*").

[4] *Id.* paras. 32, 34.

[5] *Id.* para. 33.

[6] Sprint Petition at 6.

not receive reimbursement for its services because it disclosed that it could not provide HCO and 900 services.[7]

In sum, by March 2003, two IP Relay providers had been receiving substantial cost recovery for nearly a year, despite their inability to comply with Commission rules. Sprint elected to provide the service knowing that it was not compliant with the Commission's rules. Hamilton, recognizing that the Commission had required that HCO and 900 service be offered as part of the conditions of service, withheld its entry into the IP Relay market and waited for Commission action on the industry's request for waivers of the HCO and 900 requirements.[8]

On March 14, 2003, the Commission released its *Order on Reconsideration* in this proceeding.[9] In that decision, the Commission, among other things, granted a five-year prospective waiver of the HCO and 900 service requirements to all IP Relay providers.[10] The Commission, however, denied cost recovery for past IP Relay services rendered without the ability to provide HCO and 900 services.[11]

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[7] *Id.* at 5-6.

[8] In *ex parte* comments filed on December 2, 2002, Hamilton noted that in August 2002 alone, the TRS Fund Administrator paid over $45,000 per day to IP Relay providers. *See* Letter to Marlene H. Dortch from Margot Smiley Humphrey, Counsel for Hamilton Relay, Inc., at 2 (Dec. 2, 2002) ("Hamilton December Letter").

[9] In the Matter of Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, *Order on Reconsideration*, CC Docket No. 98-67, FCC 03-46 (rel. Mar. 14, 2003) ("*Order on Reconsideration*").

[10] *Id.* paras. 18, 22, 25. IP Relay providers must submit an annual report during the five-year waiver period. *Id.* para. 22.

[11] *Id.* para. 27.

The five-year waiver of HCO and 900 services became effective upon the release date of the *Order on Reconsideration*, which was March 14, 2003. Hamilton immediately initiated IP Relay services upon the release of the *Order on Reconsideration*. Hamilton therefore has been providing IP Relay services nationwide since March 14, 2003 and has requested cost recovery from the Interstate TRS fund for services provided as of that date.

On April 14, 2003, Sprint filed its Petition seeking reconsideration of the Commission's decision to deny retroactive cost recovery. Hamilton now submits these timely Comments in response to the issues raised in the Sprint Petition, and in an effort to seek clarification of the way in which the Commission will implement its denial of cost recovery for the period prior to the effective date of the *Order on Reconsideration*.

The Commission Rationally Decided to Treat All IP Relay Providers Similarly

Hamilton welcomes the opportunity to provide IP Relay services to persons with hearing and/or speech disabilities. Hamilton supports the Commission's decisions in the *Order on Reconsideration* because they have allowed Hamilton to commence important TRS services via IP Relay.

Hamilton also supports the decision to deny retroactive cost recovery. The grant of such recovery to some providers would unjustly penalize those providers that determined in April 2002 that they were unable to comply with Commission rules and therefore did not commence IP Relay service until the release date of the *Order on Reconsideration*. The Commission's decision has rationally intended to

create a level playing field by instituting a certain date (i.e., March 14, 2003) for the commencement of cost recovery for *all* IP Relay providers.

In this regard, Hamilton supports Sprint's argument that Interstate TRS funds should not be distributed in a discriminatory manner.[12] Hamilton agrees with Sprint that it would be manifestly unjust to favor IP Relay providers that received compensation improperly. It would be similarly unjust to discriminate against IP Relay entities that did not enter the IP Relay market knowing that they could not comply with then-existing rules.

Hamilton and Sprint differ on the method of resolving the discrimination, however. To the extent that the Sprint Petition seeks cost recovery for IP Relay services provided prior to March 14, 2003, Hamilton does not support the Petition. The better approach, and the one that appears to have been adopted by the Commission in the *Order on Reconsideration*, is to deny cost recovery to all IP Relay providers for services provided prior to the effective date of the five-year waivers. In denying cost recovery for all IP Relay services provided prior to March 14, 2003, the Commission has rationally decided to treat all providers similarly and create a marketplace in which no provider has been given a discriminatory, competitive advantage over other IP Relay providers.

Sprint, in its Petition, questions the Commission's reliance on the *Bowens* and *McElroy* decisions in support of the Commission's decision to deny retroactive cost recovery. However, Sprint offers no direct legal support for authorizing

retroactive cost recovery for carriers that were not in compliance with Commission rules at the time that service was rendered.[13] Accordingly, Hamilton submits that the Commission was fully justified in denying retroactive cost recovery.

The Commission Should Not Unjustly Enrich Certain IP Relay Providers

It is clearly a part of the record in this proceeding that certain IP Relay providers received compensation from the Interstate TRS Fund, despite their

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[12] Sprint Petition at 19 (citing *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965)).

[13] Sprint submits that there is precedent for Commission grant of a retroactive waiver, citing, for example, the *Rath Microtech* decision. *Rath Microtech v. Electronic Micro Systems, Inc.*, 16 FCC Rcd 16,710 (2001) (Commission did not take enforcement action against elevator telephone manufacturer for selling non-compliant equipment). However, the Commission's refusal to take enforcement action against an individual entity is far different than a Commission decision affirmatively authorizing retroactive cost recovery for some carriers but not others. Indeed, in all of the other cases cited by Sprint, no party was harmed by the Commission's grant of a retroactive waiver. Here, in contrast, Hamilton would be unjustly harmed for having complied with the Commission's decision in the *IP Relay Order* by not seeking cost recovery, knowing that to do so would violate Commission rules. Moreover, Hamilton submits that the *Publix Show Cause Order* cited by Sprint is not applicable in this situation, and that Sprint has interpreted the decision's holding far too broadly. The *Publix Show Cause Order* mandated an evidentiary hearing at which an Administrative Law Judge must assess whether Publix is a legitimate TRS provider and substantially complied with TRS minimum standard requirements. *Publix Network Corporation*, Order to Show Cause and Notice of Opportunity for Hearing, EB Docket No. 02-149, 17 FCC Rcd 11,487, FCC 02-173, para. 20 (rel. June 19, 2002) ("*Publix Order*"). The *Publix Order* does not stand for the assertion, as Sprint seems to suggest, that a provider may ignore specific minimum standards and still claim substantial compliance with Commission rules. There is no room for arguing that a provider is in "substantial compliance" with minimum standards if it does not provide two of the standards specifically required by the Commission in the *IP Relay Order*. The inability to provide HCO and 900 services cannot be viewed as "minor deviation[s]." *Publix Order*, para. 19. Indeed, it is clear from the record that Sprint recognized in July 2002 that it did not substantially comply with the minimum standards, because Sprint specifically requested a waiver of those standards. Sprint cannot (continued…)

failure to provide HCO and 900 services and lack of a waiver for providing such services.[14] The Commission's *Order on Reconsideration* denied cost recovery and refused to grant retroactive waivers "for past services rendered in violation of the then-applicable mandatory minimum standards . . . ."[15] However, the Commission's *Order on Reconsideration* is unclear as to how the Commission will deny cost recovery to those providers that have already received compensation from the Fund because they did not disclose that they were not in compliance.

Hamilton requests that the Commission clarify that all funding disbursed to IP Relay providers prior to March 14, 2003 was improperly disbursed. Most (if not all) carriers agree, and the Commission concurs, that no IP Relay provider was or currently is capable of providing HCO and 900 services. Any IP Relay providers that certified to their ability to provide HCO and 900 services and received funding prior to the grant of the blanket five-year waiver on March 14, 2003 were thus issued the funding in error, and there should be a true-up. Therefore, those

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legitimately argue now that it "substantially complied" with minimum standards even though it did not offer two services specifically mandated by the Commission.

[14] *See* Sprint Petition at 6-7; Letter to Marlene H. Dortch from Michael B. Fingerhut, General Attorney for Sprint, at 2 & attachment p. 6 (Oct. 31, 2002); Hamilton December Letter at 2; AT&T Comments August 13, 2002, at 2 (noting infeasibility of providing 900 service); *id.* at 6 (indicating that HCO capabilities are as yet undeveloped); Letter to Marlene H. Dortch from Larry Fenster, Senior Economist for WorldCom, at 1 (Nov. 20, 2002) (noting that pay-per-call and HCO would be offered by providers "once they [become] feasible"); Reply Comments of Hamilton, at 7. In light of the numerous and varied references in this proceeding to the existence of improper disbursements to ineligible IP Relay providers, Hamilton submits that the record is clear and that the Commission can seek reimbursement of any funds improperly disbursed.

[15] *Order on Reconsideration*, para. 25.

providers should be required to disgorge all cost recovery received from the Interstate TRS Fund for IP Relay services provided prior to March 14, 2003. Rather than instituting costly and time-consuming enforcement proceedings, Hamilton suggests that the most efficient method for handling the disgorgement process would be to withhold future cost recovery from each of those providers until the balance withheld equals the amount disbursed prior to March 14, 2003. In this way, the Commission will ensure that certain providers are not unjustly enriched for having violated Commission rules.

The Public Interest Is Best Served By Encouraging Competition in the IP Relay Market

The Commission's discretionary decision to grant five-year waivers and deny retroactive cost recovery should lead to a competitive marketplace for IP Relay services, which will benefit persons with hearing and/or speech disabilities. TRS users have repeatedly expressed their desire for a competitive market for TRS services.[16] The best method of ensuring competition in the IP Relay market nationally is to encourage a competitively neutral market. A competitive national market will allow new market entrants and create the "multi-vendoring" IP Relay environment so desired by persons with hearing and/or speech disabilities. The Commission should therefore remove any anti-competitive elements present in the IP Relay market. The most blatant anti-competitive element in the IP Relay market now is the evidence of disbursements of Interstate TRS funds to providers

that did not, and could not, comply with all TRS minimum standards prior to the five-year waiver grant. Hamilton urges the Commission to remove this anti-competitive element as soon as practicable.

The Commission also must avoid creating barriers to entry into the IP Relay market. Hamilton submits that Commission inaction on improper cost recovery will create significant barriers to entry into the IP Relay market. One such example is Hamilton choosing not to enter the IP Relay market until the Commission issued the HCO and 900 service waivers. Carriers such as Hamilton simply could not gamble that the Commission would issue retroactive cost recovery. The Commission should not condone the creation of an anti-competitive market structure caused by improper payments to ineligible providers.

Finally, the Commission must ensure a competitive environment by providing carriers with regulatory certainty. In this case, a retroactive waiver to enable cost recovery would create extraordinary uncertainty and leave open the possibility of such arbitrary decisions in the future. To ensure regulatory certainty going forward, the Commission must avoid any retroactive application of its waivers.

Users Demand Quality Service and Depend on Commission Enforcement of Existing Rules in Order to Maintain Quality of Service

As a broader matter of public policy, the Commission should not allow providers to retain disbursements if they were not in compliance with Commission

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[16] *See, e.g.*, Comments of Telecommunications for the Deaf, Inc., at 8-9 (July 30, (continued…)

rules and did not say so. Users of TRS services demand and deserve high quality service; they look to the Commission to enforce its existing rules to ensure the continued quality of that service.

If the Commission were to allow those providers to retain their disbursements, it would send an improper signal to carriers that carriers can violate Commission rules and fail to make full disclosure without risk of penalty. Moreover, the unjust enrichment of those providers through Commission inaction would set a dangerous precedent for the future provision of TRS services. Specifically, TRS providers may be led to believe that they may ignore various Commission rules and still claim that they are substantially compliant and thus deserving of Interstate TRS funding. Users of TRS services deserve the best service possible, and the Commission should foster an environment in which providers strive to provide the best service possible by complying with required minimum standards. It is of paramount importance that carriers comply with Commission rules and that carriers failing to do so should not be rewarded. That is the ultimate rationale for the Commission's decision in the *Order on Reconsideration*, and Hamilton agrees with the decision.

Conclusion

For the reasons set forth above, Hamilton supports the Commission's decision in the *Order on Reconsideration*. Hamilton concurs with Sprint that the Commission must avoid discriminatory treatment of IP Relay providers. To this

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2001).

end, Hamilton urges the Commission to clarify that all Interstate TRS funding disbursed to IP Relay providers prior to March 14, 2003 was improperly disbursed and must be recouped. In this way, the Commission will ensure that a competitively neutral market exists for TRS, that providers understand and follow Commission rules, and that TRS users continue to receive quality service.

Respectfully submitted,

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